88-545

SUPREME COURT, U.S.
FILED
SEP 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1988

BRENDA J. HILL-DUNNING, PETITIONER

v.

UNITED STATES, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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September 1988

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QUESTION PRESENTED

WHETHER THE PETITIONER WAS DENIED DUE PROCESS OF LAW AS REQUIRED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN THE COURT OF MILITARY APPEALS HELD THE ERRONEOUS EXCLUSION OF THE DEFENSE EXPERT WITNESS' OPINION TESTIMONY TO BE HARMLESS ERROR?

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In the Supreme Court of the United States

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No.

BRENDA J. HILL-DUNNING, PETITIONER

v.

UNITED STATES, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

Brenda J. Hill-Dunning respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Military Appeals entered in her case on August 1, 1988.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals is reported at 26 M.J. 260 (C.M.A. 1988) (Appendix A). An unreported decision of the Air Force Court of Military Review was rendered on December 2, 1986 (Appendix B).

JURISDICTION

The jurisdiction of this Court is invoked under 10 U.S.C. § 867(h) (Supp. III 1985) and 28 U.S.C. § 1259(3) (Supp. III 1985). The judgment of the Court of Military Appeals was entered on August 1, 1988.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

Article 59(a) of the Uniform Code of Military Justice, 10 U.S.C. § 859(a) (1982) provides:

> (a) A finding or sentence of a court-martial may not be held incorrect on the ground of any error of law unless the error materially prejudices the substantial rights of the accused.

STATEMENT OF THE CASE

On March 21 and May 12-14, 1986, petitioner was convicted by a general court-martial at Columbus Air Force Base, Mississippi, on charges of making false statements and theft of $9,936.00 from the United States. She entered pleas of not guilty, but was convicted on all charges and sentenced to confinement for two years, a fine of $10,000.00, a dishonorable discharge, and reduction to the rank of airman basic.

Petitioner married Wilbert Bonner in 1973. After a stressful marriage marked with numerous separations, petitioner divorced Mr. Bonner on January 12, 1979. At trial, the prosecution presented evidence showing that petitioner continued to collect her housing allowance at the "with dependent" rate from February 1, 1983, until October 1, 1985, as a result of her representations to military officials that she was still married.[1] Petitioner

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[1] The Department of Defense Pay Manual addresses a military member's entitlement to Basic Allowance for Quarters (BAQ). A single enlisted military member, without dependents, is not entitled to this allowance except when authorized by the commander. Even if

conceded that she was not married at the time of the offenses, but presented a defense of mistake of fact, arguing that she had been suffering from a mental condition whereby she unconsciously repressed the fact that she had divorced Mr. Bonner. To that end, defense offered the expert testimony of Dr. Carmen Federowich, a psychiatrist.

Due to his "lingering doubts" as to the admissibility of Dr. Federowich's testimony, the military judge held an Article 39(a) session, a hearing held outside the presence of the jury members, to determine what her testimony would be. Dr. Federowich was prepared to testify that at the time of the offenses, petitioner was suffering from a histrionic personality disorder and engaged in a coping mechanism whereby she unconsciously denied and repressed certain stressful matters. Further, Dr. Federowich was of the expert opinion that as a result of this personality disorder, petitioner had unconsciously repressed the fact of her divorce because it was important for her to believe she was still married.

The military judge ruled that Dr. Federowich could testify about petitioner's personality disorder and about the coping mechanisms of repression and denial in general terms. He refused, however, to allow her to express her opinion as to whether or not the petitioner actually believed she was married or divorced at a certain period of time *or* to express any opinion in that same regard with respect to the repression or denial.

On appeal before the Air Force Court of Military Review, petitioner contended that the military judge erred by his limitation of the defense expert witness' testimony.

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entitled to draw BAQ, the single-rate allowance is significantly less than the with-dependent rate. To be entitled to the with-dependent rate BAQ, the enlisted military member must either be married, or have a dependent.

The Court of Military Review concluded there was "no clear abuse of judicial discretion" and affirmed the conviction and sentence.

The United States Court of Military Appeals granted discretionary review of petitioner's case. Applying Military Rules of Evidence 702-705 to the facts of the case, the court concluded that Dr. Federowich's excluded opinion testimony was proper and admissible, and the trial judge, therefore, erred by denying its admission.[2] 26 M.J. 260, at 263. However, citing Article 59(a), Uniform Code of Military Code of Military Justice, 10 U.S.C. § 859(a), the court found the error harmless. In reaching this conclusion, they considered that Dr. Federowich was allowed to testify that petitioner was suffering from a histrionic personality disorder, and explained the mechanics of denial and repression. Further, they noted that petitioner herself testified and the court had an opportunity to judge whether or not she was believable. Thus, the court concluded that the trial judge's improper ruling did not hamper the "full development of the defense theory of mistake of fact." 26 M.J. 260, at 263.

REASONS FOR GRANTING THE WRIT

Every criminal defendant has the right to a fair trial in accordance with the principles of due process guaranteed by the Federal Constitution. Essential to this right of due process is an accused's Sixth Amendment right to "call witnesses in his favor." *Rock v. Arkansas*, 475 U.S. 673, (1987). *See also Washington v. Texas*, 388 U.S. 14 (1967).

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[2] Military Rules of Evidence 702 through 705 concern testimony by expert witnesses. Specifically, they are Rule 702, Testimony by Experts; Rule 703, Bases of Opinion Testimony by Experts; Rule 704, Opinion on Ultimate Issue, and Rule 705, Disclosure of Facts or Data Underlying Expert Opinion.

Logically included in this right is an accused's right to present his or her own witnesses, and the opportunity to develop his or her defense to its maximum competence. *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982); *see United States v. Dougterty*, 473 F.2d 113, (D.C. Cir. 1972); *United States v. Barnes*, 8 M.J. 115 (C.M.A. 1979).

This is not to say that a defendant is guaranteed an error-free trial. *United States v. Hasting*, 461 U.S. 499, 508-09 (1983); *see also Delaware v. Van Arsdell*, 475 U.S. 673 (1986); *Brown v. United States*, 411 U.S. 223, 231-32 (1968). Recognizing this precept, federal and military harmless error statutes have been enacted. 10 U.S.C. § 859(a) (1982); 28 U.S.C. § 2111 (1982); Article 59(a), U.C.M.J.; *see also*, Fed. R. Crim. P. 52(a). Essentially, these statutes preclude reversal of convictions by a reviewing court when the "errors or defects have little, if any, likelihood of having changed the results of trial." *Chapman v. California*, 386 U.S. 18, 22 (1967); *see Rose v. Clark*, 478 U.S. 570 (1986). On the other hand, these harmless error rules emphasize an intention not to treat as harmless those constitutional errors that "affect substantial rights" of a party. *Chapman v. California, supra*, at 23.

When the error is of constitutional dimension, as in the present case, the standard of review of harmless error is necessarily strict. In *Chapman, supra*, this Court rejected the argument that all constitutional errors, regardless of the facts and circumstances, must automatically be deemed harmful. Nevertheless, the Court stated that when federal constitutional error is committed, reversal is required unless the reviewing court can "declare a belief that [the error] was harmless beyond a reasonable doubt." *Id.* at 24. This beyond a reasonable doubt test requires the reviewing court to find there was no possibility that the error affected the decision of the trial court. *See United*

States v. Kotteakos, 328 U.S. 750 (1976); *Schneble v. Florida*, 405 U.S. 427 (1972); *Milton v. Wainwright*, 407 U.S. 371 (1972).

Since *Chapman*, this Court has gradually broadened the use of the harmless error analysis in the constitutional context. Concomitantly, criteria have been provided for applying the harmless error rule. In *Delaware v. Van Arsdell, supra,* three factors were suggested: (1) the importance of the witness' testimony in the defendant's case, (2) whether the testimony was cumulative, and (3) the overall strength of the case. In their editorial comment in the Military Rules of Evidence Manual, the authors suggest additional questions to consider in determining the harmless error issue. S. Saltzburg, L. Schinasi, and D. Schlueter, *Military Rules of Evidence Manual* (2d ed. 1986). These include whether the error went to the heart of the defense's case and whether the exclusion of the defense's evidence made the government's evidence appear stronger than it otherwise might have. *Id.* at 19.

The petitioner contends the Court of Military Appeals denied her due process of law and erred to her substantial prejudice by concluding that the military judge's erroneous ruling did not require reversal of petitioner's conviction. It is noteworthy that no standard of analysis was articulated in support of that court's conclusion that the error was harmless. The error complained of herein is of constitutional dimension, as it denied petitioner her opportunity to develop her defense to its maximum competence. Applying the relevant test, can it be said that, beyond a reasonable doubt, the jury would have found petitioner guilty even if Dr. Federowich had been allowed to give her excluded opinion testimony? This simply cannot be concluded to such a degree of certainty.

The government's case consisted primarily of the fact that petitioner presented herself as married and subse-

quently received the married rate housing allowance during the charged period. Against this, petitioner testified that during the relevant period she honestly believed she was still married and she truly had not remembered divorcing her husband in early 1979. Her testimony, standing alone, to the average layperson untrained in psychology, appears incredulous at best. Therefore, the defense needed Dr. Federowich's excluded opinion testimony to serve as a linchpin, connecting the diagnosed personality disorder to petitioner's actual state of mind.

Only an expert could make this connection—that the disorder was so severe that it was reasonable that petitioner in fact unconsciously repressed the memory of her divorce at the times pertinent to the alleged offenses. Certainly this opinion testimony which the Court of Appeals determined would have been "helpful to the finder of fact" could very likely have resulted in the court members finding appellant was under an honest mistake of fact and thus not guilty of the offenses. This erroneously omitted testimony pulled together an otherwise unbelievable story of "I forgot" into a fully developed, credible defense of mistake of fact.

This denial of petitioner's opportunity to present her defense, to its maximum competence, was to her substantial prejudice. Therefore, the error cannot be deemed to be harmless.

CONCLUSION

The influence of the erroneously excluded expert opinion testimony on the finder of fact in this case is clear. The substantial right of the petitioner to perfect and develop her defense to its maximum potential was impaired. Under the facts, it is impossible to say, beyond a reasonable doubt, that even with the excluded testimony the jury would have found petitioner guilty. Accordingly, the

petitioner contends the Court of Appeals' conclusion of harmless error was erroneous, and the case warrants further examination by this court. Therefore, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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September 1988

APPENDICES

UNITED STATES COURT OF MILITARY APPEALS

No. 57,019
ACM 25508

UNITED STATES, APPELLEE

v.

BRENDA J. HILL-DUNNING,
STAFF SERGEANT U.S. AIR FORCE, APPELLANT

Aug. 1, 1988

For Appellant: *Captain Lynne H. Wetzell* (argued); *Colonel Leo L. Sergi* (on brief); *Captain Charles L. Wille.*

For Appellee: *Major Carole W. Hanson* (argued); *Colonel Joe R. Lamport, Lieutenant Colonel Robert E. Giovagnoni* (on brief); *Captain Jeffrey H. Curtis.*

OPINION OF THE COURT

COX, Judge:

Appellant was tried by a general court-martial made up of officer members at Columbus Air Force Base, Mississippi. She was charged with two specifications of signing a false official statement and one specification of larceny, in violation of Articles 107 and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 907 and 921, respectively. Contrary to her pleas, she was found guilty of all charges and specifications, and was sentenced to a dishonorable discharge, confinement for 2 years, total forfeitures, a fine of $10,000.00, and reduction to the grade of airman basic. The convening authority approved

the sentence as adjudged, and the Court of Military Review affirmed in an unpublished opinion. Appellant nows asks us to determine whether "the military judge abuse[d] his discretion by refusing to permit a defense expert witness to testify as to the ultimate issue in the case."

Subsequent to her divorce, appellant applied for and received basic housing allowances at the "with dependent" rate, as if she were still married. At trial, the defense conceded that appellant was not married at the time of the offenses, but presented a "mistake of fact"[1] defense to the charges. Specifically, the defense argued that appellant suffered from a mental condition whereby she unconsciously suppressed or denied the fact that she was no longer married. To that end, defense counsel offered the testimony of an expert witness, Dr. Carmen Federowich, a psychiatrist who had examined appellant concerning this court-martial.

At an Article 39(a) session[2] held prior to her testimony, Dr. Federowich related to the court her professional qualifications and her post-examination diagnosis of appellant. Dr. Federowich was prepared to testify that, at the time of the offenses, appellant was engaging in a coping mechanism which caused confused thinking during times of stress. Further, appellant's mental condition caused unconscious denial and repression of certain matters, and she was using these mechanisms to reject or sublimate the fact of her divorce because it was important for her to believe she was still married.

The military judge questioned Dr. Federowich about the bases for her conclusions[3] and ruled that she could testify

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[1] *See* para. 5-11, DA Pam. 27-9, "Military Judges' Benchbook" (C. 1) (Feb. 15, 1985).

[2] Uniform Code of Military Justice, 10 U.S.C. § 839(a).

[3] *See* Appendix.

about the concept of repression and denial in general terms. He refused, however,

> to allow the witness to express her opinion as to whether or not the accused actually knew whether she was married or divorced at a certain period of time *or to express any opinion in that same regard with respect to the repression or denial.*

(Emphasis added.) It is this limitation on the expert's testimony that is the subject of this appeal.

It is apparent from this case and others we have seen recently that Mil.R.Evid. 704,[4] the so-called "ultimate issue" rule, is causing some uncertainty in its application. *Cf. United States v. Arruza*, 26 M.J. 234 (C.M.A. 1988); *United States v. White*, 25 M.J. 50 (C.M.A. 1987); *United States v. Petersen*, 24 M.J. 283 (C.M.A. 1987); *United States v. Cameron*, 21 M.J. 59 (C.M.A. 1985). It is, therefore, appropriate to revisit the rule and attempt to bring some order into its application.

First, let's look at Mil.R.Evid. 704 as it is set out in the Manual for Courts-Martial, United States, 1984.

Rule 704. Opinion on ultimate issue

> Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

The rule is simply stated. It's legislative history indicates that it was adopted to facilitate the basic approach to opinion evidence, whether from lay witnesses or experts. It is not, itself, a rule of inclusion. It was designed to remove bars to admission of opinions when such action would be "helpful to the trier of fact. In order to render this ap-

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[4] Manual for Courts-Martial, United States, 1984.

proach fully effective and to allay any doubt on the subject, the so-called 'ultimate issue' rule [which prevailed under common law rules of evidence] is specifically abolished by the instant rule." Notes of Advisory Committee on Proposed Rules, 28 U.S.C.A., Federal Rules of Evidence 114. *See also* S. Saltzburg & K. Redden, *Federal Rules of Evidence Manual* 698 (4th ed. 1986).

However,

> [t]he abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day.

J. Weinstein & M. Berger, 3 *Weinstein's Evidence* 704-4 (1987), *citing* McCormick, *Evidence* § 12 (1954). *Cf. United States v. Gipson*, 24 M.J. 246, 251 (C.M.A. 1987).

In summary, while the rule clearly permits "ultimate-issue" opinions from either lay or expert witnesses, it does not open the door to any and all opinions. The following analytical model might prove helpful to the bench and bar when confronted with "ultimate-issue" testimony:

a. Go back to Mil.R.Evid. 402, the basic rule for admissibility, and answer the following questions:

(1) What is the legal relevance of the evidence?

(2) What fact in controversy is being made more or less probable? and,

(3) Will the opinion be helpful to the determination of that fact? Mil.R.Evid. 702. *See United States v. Downing*, 753 F.2d 1224, 1235 (3d Cir. 1985); *United States v.*

Gipson, supra at 251. Confine the expert to his or her discipline.

(4) Is there any other rule of evidence that makes the opinion inadmissible?

b. Weigh admissibility of the evidence under Mil.R.Evid. 403. If the proffered opinion satisfies these tests, it is admissible.

We have consistently held that the opinions of one witness concerning the credibility or believability of another witness are inadmissible. We do not permit witnesses to pit themselves against one another. *United States v. Arruza, United States v. White, United States v. Petersen,* and *United States v. Cameron,* all *supra.* Mil.R.Evid. 704 was not designed to bring in the "oath-helpers" referred to by McCormick, *supra.* Mil.R.Evid. 608 enumerates the method of attacking or bolstering the credibility of witnesses.

The problem seems to be in drawing a distinction between the expert who has an opinion based upon a belief in the truthfulness of what another person has told him and the expert whose opinion is that the other person is truthful. This, however, is a distinction which can and must be drawn and recognized. Thus, the psychiatrist who comes into court is perfectly competent to testify as to the diagnosis and indeed may testify that the diagnosis is based upon the *assumption* that what the client has said is the truth. *See* Mil.R.Evid. 705. Yet, that same witness may not testify that it is his opinion that the client is truthful absent appropriate foundation. *See United States v. Gipson, supra.* This latter testimony is not rendered inadmissible because it embraces the "ultimate issue," *but simply because it is not relevant and helpful under the rules.* It may be very helpful for factfinders to understand the expert's opinion regarding the mental condition of a witness,

the symptoms of injury or disease, and the expert's diagnosis. Indeed, it may well be relevant for the fact-finders to know that the expert must necessarily believe the patient in order to formulate the diagnosis; but that does not qualify the expert to express outright the opinion that the patient indeed is "truthful." *See generally United States v. Tolppa,* 25 M.J. 352, 354-55 (C.M.A. 1987); *United States v. Azure,* 801 F.2d 336, 339-41 (8th Cir. 1986). *See also Ellis v. Jacob,* 26 M.J. 90 (C.M.A. 1988). Thus, it is not relevant or helpful for the expert to express an opinion about whether the jury should believe the witness.

In this same vein, our *Gipson* decision should not be construed as permitting a polygrapher to opine that he believes or disbelieves a witness. "At best, the expert can opine whether the examinee was being truthful or deceptive in making a particular assertion *at the time of the polygraph exam." Id.* at 252-53. What the rules of evidence are trying to accomplish is to posture the expert testimony so that the factfinders can employ this expertise as a tool to evaluate the total evidence before them. The rules strive to create an environment where rational fact-finders can have as much information available as is reasonably necessary to aid them in making an informed and intelligent decision.

Applying Mil.R.Evid. 702-705 to the facts of this case, we conclude that the military judge was too broad in his application of the rules to the testimony of Dr. Federowich. First, it is true that Dr. Federowich was being asked to express her opinion on the "ultimate issue," *i.e.*, did Sergeant Hill-Dunning unconsciously repress the fact that she was divorced? Mil.R.Evid. 704, however does not preclude this question if the expert is competent to express such an opinion. Also, the fact that Dr. Federowich's opinion was based upon her belief in what her patient was

telling her is not of moment. Indeed, in order for any expert to form an opinion, it must be predicated upon *some assumption of the truth* of underlying facts. As we read the testimony, the military judge would not permit the doctor to express her final diagnosis because it was based on the fact that she believed what appellant had told her during psychiatric counseling sessions. That simply is not the test.

The military judge was correct in ruling that Dr. Federowich could not testify that, in her opinion, appellant was being truthful. However, the doctor could have testified that her expert opinon was based upon her assumption that appellant was being truthful. Further, she could have opined that appellant's claim was consistent with her mental/emotional make-up. The relevant evidence here—the evidence that is "helpful" to the finders of fact—is the expert's opinion about the dynamics of appellant's mental condition at the times pertinent to the alleged offenses. The fact that the doctor believed appellant may have been incidental to her expert opinion and, indeed, the basis of her opinion. However, the aim of her testimony was to inform the factfinders about a mental condition that causes unconscious "denial" and "repression" of certain matters. Put into its proper perspective, the question of appellant's credibility is left with the finders of fact where it appropriately belongs.

We do not find, however, that the military judge's ruling requires reversal of appellant's conviction. Art. 59(a), UCMJ, 10 U.S.C. § 859(a). Dr. Federowich was a well-qualified expert; she ably provided the court-martial with information concerning appellant's mental condition; and she clearly explained the mechanisms of "denial" and "repression." She further delineated not only her diagnosis, but also appellant's prior history of psychological problems. Thus, Dr. Federowich made a

link between appellant's histrionic personality disorder and the unconscious mechanisms of "denial" and "repression."

These opinions could only have been reached after making a judgment about appellant's credibility: that is to say—appellant was telling the truth, as far as the witness was concerned.

Appellant testified at trial and the court members had the opportunity to judge for themselves whether she was believable. She demonstrated, through her own testimony and that given by other witnesses, that her behavior patterns were consistent with those of a married woman. Dr. Federowich was able to link these patterns to her theory that appellant's behavior was caused by "denial" and "repression" of knowledge of real facts and situations that caused her to suffer undue stress or emotional pain. Thus, we conclude that the military judge's ruling did not hamper full development of the defense theory of mistake of fact. Unfortunately for appellant, the Government offered convincing evidence to the contrary, and the defense was rejected by the court members. We find no reason to disturb that verdict on appeal.

We hold that the military judge's refusal to permit the defense expert witness to testify as to the ultimate issue did not constitute reversible error.

The decision of the United States Air Force Court of Military Review is affirmed.

Chief Judge EVERETT and Judge SULLIVAN concur.

APPENDIX

Questions by Military Judge:

Q: Dr. Federowich, we have a concept in the law called intentional ignorance or deliberate ignorance. Are you familiar with that?

A: No.

Q: Basically that refers to what happens when someone had knowledge of a certain fact which, if it was known that they knew that, might draw some adverse legal consequences to them. In this case, do you know what the charges are against Sergeant Hill-Dunning in this case?

A: Yes.

Q: What are they?

A: That she intentionally intended to defraud the Government by claiming she was married when she was in fact divorced to, apparently, get some extra money.

Q: Well, you can appreciate then, that the job of this jury is going to be to determine, as I'm seeing it at this point, whether Sergeant Hill-Dunning was intentionally ignorant of the fact that she was divorced, which would be a conscious process, as I understand it, or did she unconsciously repress this knowledge. Now, as a psychiatrist, how would you determine it? How could you distinguish a person who was deliberately ignorant from one who was unconsciously repressing things?

A: From the interviews and my knowledge of the type of illness that she has, a review of the records, and her demeanor. I could give you an opinion on it.

Q: How would a psychiatrist go about doing that? You said you gave a MMPI. Is there a test that a psychiatrist can give to distinguish deliberate ignorance from repression?

A: There is no specific test. There's no test as to detect when someone is lying or not. You have to just form an opinion from all the information that you have.

Q: Well, I take it then, in order to come to the conclusion that Sergeant Hill-Dunning was unconsciously repressing this information, you have to make an assessment of her credibility. Is that correct?

A: Yes.

Q: So you have to be of the opinion that she's telling the truth to you when she relates this information to you?

A: Yes, Sir.

Q: Would you agree that psychiatrists are generally no better qualifed than a layman who's experienced in the ways of the world in determining whether someone is being truthful or not?

A: Well, psychiatrists are more aware, I think, of mental illnesses and how these impair how a person deals with life.

Q: Yes ma'am, I understand that; but are you saying that a psychiatrist is better qualified to determine if someone is lying or telling the truth than a layman who's experienced in the ways of the world?

A: No, I'm not.

Q: You wouldn't say that?

A: (Negative response.)

Q: If I understand you correctly, then, Doctor, your diagnosis of unconscious repression is solely related to your belief that the Accused told you the truth?

A: Well, it's based, like I said, on my records, my expertise in psychiatric illness, and the type of disorder that she has.

Q: If I'm understanding you correctly, Doctor, then you're saying that a psychiatrist is no better

qualified to distinguish intentional ignorance from unconscious repression than a layman?

A: I believe I can give you an opinion, an expert opinion, as to whether I feel she's using coping mechanisms of repression and denial.

Q: And that would be directly related to your assessment as to whether or not she's being truthful?

A: (Affirmative response.)

Q: In this case we've had evidence introduced that for a number of years, Sergeant Hill-Dunning filed income tax returns indicating that she was either single or head of household. For most of those years . . . she received an income tax refund. Now, can you explain how that is consistent with your opinion that she was unconsciously repressing this divorce? In other words, what I don't understand is how someone could unconsciously repress such things, but when it comes tax time suddenly remember that they were divorced.

A: Well, she knew she wasn't living with him; she was separated. She could have considered herself single in that regard. I mean, that could be her way of thinking. I didn't ask her that question.

* * * * * *

Q: So, it is safe to say that you're speculating, then, as to how she might come to that conclusion?

A: Right.

Q: Wouldn't the fact that someone files tax returns, though, indicating that they're single or head of household indicate a situation whereby or argue heavily against a diagnosis of unconscious repression of this information?

A: It could.

Q: Now, Doctor, I'm obviously not an expert in these areas, but the very words "repression or denial" connote to me that one must be conscious of this threatening event in order to repress it. Is that right or wrong?

A: (No response.)

Q: At some point must a person be aware of the threat to their psyche in order to repress it?

A: Once that mechanism occurs, it's unconscious. It's out of the person's awareness. There's a difference between somebody who's saying, "I'm lying about this and I'm just saying it because it's convenient to me or whatever," and someone who actually has a belief that this is not a fact. This is the case of a person who uses repression and denial. It's not a deliberate thing.

* * * * * *

Q: No, I understand that; but before that subconscious or unconscious process takes over, there must be conscious fear of this situation. Is that correct?

Y: Yes. At one point they're conscious of it.

Q: So, in this case, . . . if she was using denial or repression, then at some point she must have been aware of the fact that she was divorced before she could repress it or deny it. Is that true?

A: Yes, that's true.

Q: Doctor, are you a member of the American Psychiatric Association?

A: Yes.

Q: Is it true that it's the position of the APA that psychiatrists are no better able to determine

whether an individual is lying than the average layman?

A: Yes, that's true.

Q: Do you agree with that position or do you disagree with the APA position?

A: No, I agree with the APA.

UNITED STATES AIR FORCE COURT OF MILITARY REVIEW

ACM 25508

UNITED STATES

v.

STAFF SERGEANT BRENDA J. HILL-DUNNING,
FR 422-66-4187, UNITED STATES AIR FORCE

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2 DEC 1986

Sentence adjudged 14 May 1986 by GCM convened at Columbus Air Force Base, Mississippi. Military Judge: Vernon J. King, Jr.

Approved sentence: Dishonorable discharge, confinement for two (2) years, forfeiture of all pay and allowances, fine of ten thousand dollars ($10,000.00) and reduction to airman basic.

Appellate Counsel for the Appellant: Colonel Leo L. Sergi and Captain Charles L. Wille. Appellate Counsel for the United States: Colonel Kenneth R. Rengert, Colonel Joe R. Lamport, Lieutenant Colonel Robert E. Giovagnoni and Captain Anthony P. Dattilo.

Before

HODGSON, FORAY and HOLTE
Appellate Military Judges

DECISION

HODGSON, Chief Judge:

On 14 June 1973, the appellant married Wilbert Bonner, but their union was difficult and stressful. After repeated separations and reconciliations, she divorced him on 12 January 1979. However, she continued to accept her housing allowance at the married rate. This resulted in a conviction of two allegations of making a false statement with intent to deceive and larceny of almost $10,000 dollars.

While the defense at trial conceded that the appellant divorced her husband in early 1979, they urged that her emotional condition, diagnosed as a "histrionic personality disorder and adjustment reaction with depressed mood", was such that she honestly believed that she was still married to her first husband during the period she received the BAQ overpayments. Doctor Carmen Federowich, a clinical psychiatrist, testified that the appellant's first marriage was very important to her and that denial and repression are coping mechanisms in which a person puts out of his or her conscious mind facts or difficulties—it is an unconscious mechanism. Trial defense counsel argued that since the appellant had "blocked out" the fact of her divorce, she was entitled to a not guilty verdict on all counts. The trial judge then instructed the members on mistake of fact as a complete defense.

The issue before us is the trial judge's refusal to allow Doctor Federowich to state, "whether the [appellant] actually believed she was married at the time of the offenses or whether she had unconsciously repressed or denied such knowledge." The judge considered Doctor Federowich's testimony to be an opinion on the ultimate issue[1] as to the

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[1] Mil. R. Evid. 704. OPINION OF ULTIMATE ISSUE
Testimony [in] the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided under the trier of fact.

appellant's guilt or innocence. Conversely, appellate defense counsel contend that Federowich's opinion would assist the trier of fact, and is permitted under Mil. R. Evid. 702, 703 and 704.

Mil. R. Evid. 704 eliminated the prior restriction against admitting opinion testimony on the ultimate issue of the case. However, the Rule does not permit a witness to testify as to his or her opinion as to the guilt or innocence of the accused. *See* S. Saltzburg, L. Schinasi and D. Schlueter, *Military Rules of Evidence*, 2d ed., p. 599. Rather, the Rule allows testimony involving an issue which must be decided by the trier of fact. Although, the two purposes may be closely related, they are distinct as a matter of law and admissibility of testimony in this category depends on the nature of the issue, the circumstances of the case, and judicial discretion. *United States v. Cameron*, 21 M.J. 59 (C.M.A. 1985).

As stated earlier, the appellant's defense was bottomed on mistake of fact, i.e., she believed she was married during the period she accepted the BAQ overpayments. In this regard, she offered psychiatric testimony concerning her emotional state as to why she unconsciously suppressed her divorce. There was no dispute as to her mental responsibility in general.

The only restriction the trial judge placed upon defense counsel was that he could not, in effect, ask the witness to state, what was essentially a legal conclusion, that the appellant thought she was married when she accepted the overpayments. *See generally Nichols v. State*, 340 S.E.2d 624 (Ga. App. 1986). This was the ultimate issue to be decided by the members under proper instructions. Beyond the limitations just discussed the trial defense counsel was free to draw from Doctor Federowich the nature and extent of the appellant's personality disorder

and how it might effect her not remembering the earlier divorce.

Under the facts of this case we find no clear abuse of judicial discretion so as to justify reversing the trial court's decision to limit Doctor Federowich's testimony. *United States v. Ness*, 665 F.2d 248 (8th Cir. 1981).

Finally, we have examined the remaining assigned error and resolve it adversely to the appellant. *See United States v. Ragins*, 11 M.J. 42 (C.M.A. 1981).

For the reason stated the findings of guilty and the sentence are AFFIRMED.

Senior Judge FORAY and Judge HOLTE concur.

OFFICIAL:

/s/ FELIX LANDAU
Captain, USAF
Chief Commissioner

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Supreme Court, U.S.
FILED
NOV 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-545

In the Supreme Court of the United States

OCTOBER TERM, 1988

BRENDA J. HILL-DUNNING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, under the facts of this case, the exclusion of an expert's ultimate opinion was harmless error.

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BRENDA J. HILL-DUNNING, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-13a) is reported at 26 M.J. 260. The opinion of the Air Force Court of Military Review (Pet. App. 14a-17a) is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on August 1, 1988. The petition for a writ of certiorari was filed on September 29, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. IV) 1259(3).

STATEMENT

Following a general court-martial at Columbus Air Force Base in Mississippi, petitioner, a member of the United States Air Force, was convicted on two counts of

signing a false official statement and on one count of larceny, in violation of Articles 107 and 121 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 907 and 921. She was sentenced to confinement for two years, a dishonorable discharge, total forfeiture of pay, a fine of $10,000, and a reduction in grade. The convening authority approved the findings and sentence. The Air Force Court of Military Review affirmed the findings and sentence (Pet. App. 14a-17a). The Court of Military Appeals affirmed (*id.* at 1a-13a).

1. Petitioner divorced Wilbert Bonner on January 12, 1979 (PX 3). The divorce was granted by the Chancery Court for Mississippi County, Arkansas. *Ibid.* Petitioner did not inform military officials of her divorce, however, and she continued to collect quarters and housing allowances at the "with dependent" rate (Tr. 190). As a result, during the period from February 1, 1983, until October 1, 1985, petitioner collected $9,936.77 from the government to which she was not entitled (*ibid.*; PX 12). Additionally, when applying for a loan from the Air Force Aid Society on April 17, 1984, petitioner falsely stated in official documents that she was still married to Wilbert Bonner and was providing support to him (PX 13).

In October 1985, petitioner decided to marry Steve Dunning (Tr. 267-268). To avoid disclosing her earlier divorce, she obtained a second divorce from the Chancery Court of Harrison County, Mississippi, on October 1, 1985 (PX 6). Petitioner then married Steve Dunning on October 3 (PX 11). On October 24, petitioner was questioned by a special agent of the Air Force Office of Special Investigation (OSI) concerning her marital status with Wilbert Bonner and her receipt of monies at the "with dependent" rate (Tr. 163-165). Petitioner thereafter executed documents with Air Force officials wherein she

stated that she had divorced Wilbert Bonner on October 1, 1985 (PX 9).

2. At trial, petitioner conceded that she was not married to Wilbert Bonner at the time of the charged offenses (Tr. 256). Petitioner presented a mistake of fact defense, under which she claimed that she unconsciously repressed the fact that she had divorced Wilbert Bonner in 1979 (Tr. 255, 263).

The defense called Dr. Carmen Federowich, a clinical psychiatrist, to testify about petitioner's mental condition and her repression of the fact that she was divorced. Following an extensive hearing on the admissibility of her testimony (Tr. 205-239), the trial judge allowed Dr. Federowich to testify about petitioner's mental condition, her repression and denial, and the effects of petitioner's histrionic personality disorder (Tr. 237-239). The trial judge did not allow Dr. Federowich to offer an opinion on the question whether petitioner actually knew whether she was married or divorced at the time the offenses were committed (*ibid.*).

3. The Air Force Court of Military Review found no clear abuse of discretion in the trial judge's rulings under the facts of the case and affirmed the conviction and sentence. Pet. App. 17a. The Court of Military Appeals also affirmed. *Id.* at 1a-13a. It held that the trial judge erred by not allowing the psychiatrist to express her opinion on the ultimate issue of petitioner's mental responsibility. Under the facts of the case, however, the Court of Military Appeals held that the error was harmless, because the exclusion did not prevent petitioner from fully developing a mistake of fact defense. *Id.* at 6a-8a.

ARGUMENT

Petitioner contends the Court of Military Appeals erred in ruling that the exclusion of Dr. Federowich's opinion

was harmless. That fact-bound claim does not warrant review by this Court.

Petitioner asserts (Pet. 6-7) that the trial judge's action violated her due process right to present favorable defense evidence. Petitioner did not object on that basis at trial, however, and she has therefore waived any such claim. In any event, petitioner's claim lacks merit under any harmless error standard.

The Court of Military Appeals carefully analyzed the trial court's error in accordance with Article 59(a) of the UCMJ, 10 U.S.C. 859(a), the harmless error statute applicable to the military justice system.* The court found that the trial judge's evidentiary ruling did not prevent petitioner from fully presenting her mistake of fact defense. Pet. App. 8a. In reaching that conclusion, the court relied on the fact that Dr. Federowich was a well qualified expert; that she ably provided the court-martial with information concerning petitioner's mental condition, which consisted of a histrionic personality disorder; that she explained the mechanisms of "denial" and "repression"; that she delineated not only her diagnosis but also petitioner's prior history of psychological problems; and that she was able to link petitioner's mental condition and the unconscious mechanisms of "denial" and "repression." *Id.* at 7a-8a. Additionally, the court noted that petitioner testified regarding the mistake of fact defense, and the court-martial members therefore had an opportunity to assess her credibility. Moreover, petitioner's testimony, along with the testimony provided by other defense witnesses (Tr. 303-319), allowed Dr. Federowich to link petitioner's

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* Article 59(a), 10 U.S.C. 859(a), provides as follows:

> A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.

behavior to the mistake of fact defense. The trial judge's evidentiary ruling therefore did not prevent petitioner from offering a mistake of fact defense and making use of the expert's testimony to buttress that defense. Finally, the prosecution introduced overwhelming proof of petitioner's intent, including documentary proof that petitioner had filed income tax returns from 1979 to 1984 as a single person (PX 14D-W), and the fact that the 1979 divorce decree recited that petitioner had personally appeared at the hearing (PX 3). Indeed, petitioner's own trial testimony established that she recalled meeting with her divorce attorney in 1979 and paying him (Tr. 256, 265, 270, 283).

Under these circumstances, the Court of Military Appeals correctly found that the error was harmless. Its decision is consistent with this Court's teachings that reversal is not warranted when "errors or defects that have little, if any, likelihood of having changed the result of trial." *Chapman* v. *California,* 386 U.S. 18, 22 (1967). Petitioner simply disagrees with the lower courts' resolution of that fact-bound issue. She does not allege any conflict among the circuits on this point of law, and under any standard of harmless error analysis, the error in this case did not have a material effect on the verdict. For these reasons, this case does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1988

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—241-699/60749